IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 557 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE SHARAD D.DAVE Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ANILKUMAR NARMADASHANKAR TRIVEDI

Versus

PATEL DHANJIBHAI BHIMABHAI BHUVA

Appearance:

MR SURESH M SHAH for Petitioner No. 1

MR MEHUL S SHAH for Petitioner No. 1

MR KIRIT I PATEL for Respondents No. 1-2

CORAM : MR.JUSTICE SHARAD D.DAVE

Date of decision: 20/02/2002

CAV JUDGEMENT

The petitioner - original defendant has filed this application against the order passed by the Court of Extra Assistant Judge, Gondal in Misc. Civil Appeal No.91 of 1995.

2. The short facts of the present application is as under.

3. That the respondents - original plaintiffs, soon after purchase of the suit property, in which the present petitioner and other are sitting tenants, instituted a suit against the present petitioner - original defendant for declaration and permanent injunction alleging that they have right to erect dividing wall in the osri and terrace over the residential room of the petitioner, alleging that the present petitioner has no right to the same as tenant and he cannot be prevented in making construction and, therein, by application, Ex.5, the respondents - original plaintiffs prayed for interim injunction, restraining the present petitioner from getting construction in terrace and dividing wall in osri.

4. Earlier the trial Court issued a show cause notice regarding Ex.5 to the present petitioner. On issuance of the show cause notice, the petitioner contested the case and claim of the respondents and after hearing the parties the trial Court granted the application, Ex.5, and issued interim injunction as prayed for, which was suspended on application of the present petitioner.

5. Being aggrieved by the aforesaid order of the trial Court, the petitioner preferred an appeal before the lower appellate Court. The lower appellate Court after hearing both the parties allowed the appeal of the present petitioner partly, vacated interim injunction order as regards osri and confirmed rest of the order of injunction as regards construction on the terrace, though the petitioner is in possession and enjoyment thereof as tenant all throughout. Being aggrieved by the aforesaid order, the present petitioner - original defendant has filed present Civil Revision Application.

6. I have heard Mr.S.M.Shah, learned advocate for the petitioner - original defendant. He has submitted that the lower Courts have exercised jurisdiction not vested in them by law and have acted illegally and with material irregularity in granting interim injunction order against the present petitioner - original defendant. That the lower appellate Court has failed to appreciate that as per the settled position of law, the tenant of the property has licensee rights to enjoy terrace even if he is not tenant for the terrace and, as such, the injunction issued to the petitioner is issued without any basis or jurisdiction. That the lower

appellate Court has exercised jurisdiction not vested on it, thereby caused miscarriage of justice and, therefore, this application should be allowed with costs.

7. In support of his submissions, Mr.S.M.Shah, learned advocate has relied upon the following authorities.

(i) Maganlal Parsottamdas Sevniwala Vs. Chimanlal Dahyabhai Modi, reported in 1980 G.L.R. 1002.

(ii) Election Officer, Rohishala Gram Panchayat and Deputy Mamlatdar, Revenue, Botad and Others Vs. Dharamshibhai Muljibhai, reported in 1997(1) G.L.H. 242.

(iii) Bank of Maharashtra Vs. Race Shipping and Transport Co. Pvt. Ltd. and another, reported in AIR 1995 SC 1368.

8. Against the aforesaid submissions, Mr.K.I.Patel, learned advocate for the respondents - original plaintiffs submitted that they are the owners of the property in question. They have possessed the property with the sitting tenants. He has further stated that the petitioner - original defendant is in possession of only one room, half osri, kitchen, one common bathroom and toilet. Except these, the present petitioner - original defendant is not tenant of any premises much less the terrace.

9. It is not in dispute that the respondents are landlords and the petitioner is his tenant - original defendant against whom the original landlord has filed Civil Suit No.181 of 1989. Wherein it is also stated that the premises which is in possession of the petitioner - original defendant is a tenanted premises and the present petitioner is paying monthly rent of Rs.280/=.

10. Under these circumstances it can be stated that the defendant is not in possession of the terrace. It is the right of the landlords to construct over the tenanted premises. Both the trial Court has rightly permitted the landlords for construction of the floor on the tenanted premisses. When there are two concurrent orders of the trial Court, the High Court should be very less scope in interfering with the order of the trial Court. The jurisdiction under Section 115 of C.P.C. is very much

limited. Therefore, this Court should not interfere with the order of the trial Court.

11. According to Mr.K.I.Patel, learned advocate for the respondents, necessary permission has been granted by the authority for construction of the floor on the tenanted premises, therefore, the present petitioner original defendant has no authority to prevent the respondents - original plaintiffs in constructing over the tenanted premises. Therefore, the present application filed by the present petitioner original defendant deserves to be dismissed with costs.

12. In support of his submissions, Mr.K.I.Patel, learned advocate has relied upon the following authorities :

(i) Shantilal Lallubhai Pujara and another Vs. Kiritkumar Jayantilal Ghancha and another, reported in 1995(1) G.L.H. 638.

(2) Dayabhai Manchharam Bhandari Vs. Ratilal Maganlal, reported in 1980 G.L.R. 557.

13. I have gone through the authorities cited by the learned advocates for both the parties and I have perused the papers produced with this application. One thing is undisputed that the authority has granted permission to the respondent - original plaintiffs to construct over the first floor on the suit premises and the landlords wanted to construct over the tenanted premises. The trial Court after hearing the learned advocates for both the parties permitted the landlords to construct over the tenanted premises. Being dissatisfied with the order of the trial Court, the present petitioner filed an appeal before the District Court an by order dated 06.03.1997, the Extra Assistant Judge, Gondal modified the order to the effect that landlords have no right to construct over common osri. However, the rest of the order i.e. construction on the terrace portion was confirmed. The learned appellate Court came to the conclusion that there is no material irregularity in passing the order by the trial Court and ultimately allowed the appeal in part.

14. So far as the jurisdiction of this Court under Section 115 of the C.P.C. is concerned, reference deserves to be made to a binding decision of the Apex Court in case of M.D. (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad & Ors. Vs. Ajit Prasad Tarway, Manager (Purchase & Stores), Hindustan Aeronautics Ltd. Balanagar, reported in AIR 1973 SC 76, wherein it is

observed that :

> "In our opinion the High Court has no jurisdiction to interfere with the order of the First Appellate Court. It is not the conclusion of the High Court that the first appellate Court has no jurisdiction to make the order that it made. The order of the first appellate Court may be right or wrong; may be in accordance with law or may not be in accordance with law; but one thing is clear that, it had jurisdiction to make that order. It is not the case that the first appellate Court exercised its jurisdiction either illegally or with material irregularity. That being so the High Court would not have invoked its jurisdiction U/s. 115 of the C.P.C."

15. This Court (Coram : A.P.Ravani, J) in case of Jamnadas Hiralal Mendha Vs. State of Gujarat and Ors. reported in 1982 (2) G.L.R. 1288, has also cautioned, the interference with the order of the Trial Court under Sec.115 of the C.P.C. and observed that every order howsoever bad or against the law, it cannot be interfered with.

16. In the case of M/s. D.L.F. Housing and Construction Co. (P) Ltd., Vs. Swaroopsingh & ors. reported in A.I.R. 1971 SC 2324 is observed that while exercising the jurisdictional powers under Section 115 of the Code of Civil Procedure, it is not open to the High Court to correct the errors of facts. However, the gross or even errors of law, unless the said errors, wherein the word "Illegal" and "Material irregularities" are used, Clause-C do not cover either errors of facts or law. They do not refer to the decision arrived at but merely, to the manner in which it is reached.

17. Under the aforesaid circumstances, I am of the opinion that both the learned trial Courts have rightly concurred in their opinion and allow the construction on the suit tenanted premises except the osri part as modified by the learned appellate Court.

18. In view of the aforesaid discussions, I do not find any material irregularities in the order passed by the Extra Assistant Judge, Gondal and hence, no interference of this Court is required and, therefore, this Civil Revision Application is dismissed accordingly and injunction which is in force till today is vacated.

Rule discharged.

Sd/-

(Sharad D.Dave,J)

'Bhavesh'